Supreme Court, U.S.
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No. 08-804

In The
Supreme Court of the United States

LOU ANNE LAVENDER PERKINS,
Petitioner,

v.

DCC LITIGATION FACILITY, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Sixth Circuit erred by affirming the entry of judgment denying Perkins's motion to opt out of the Settlement Facility-Dow Corning Trust after the opt-out deadline had elapsed.

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339 U.S. 306, 314 (1950) 6

OPINIONS BELOW

The opinion of the Sixth Circuit affirming the district court's judgment (Pet. App. _____) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is case involving a class-action regarding silicone gel breast implants. Under the Amended Joint Plan of Reorganization for Dow Corning Corporation, claimants had the option to settle or to elect to opt out of the settlement under the Settlement Facility and proceed with litigation against the Litigation Facility. Claimants electing to pursue litigation instead of participating in the settlement program "must make their election by completing, signing and returning the Participation Form to the Claims Office on or before the six (6)-month anniversary of the Effective Date ("Election Deadline")." (Settlement Fund and Distribution Agreement, Annex A. Art.3.02(c)(v)). The Election Deadline was November 29, 2004.

On September 10, 2003, Perkins updated her information to include her name, address and diagnosis and requested assistance and information from the Dow Corning Tort Committee, a government appointed committee serving as a go-between the Settlement Facility an the claimants', via email to: info@tortcomm.org. Perkins was not informed that the Dow Corning Settlement Facility did not have her correct address until after the

November 29, 2004 deadline to opt-out. Because she never received a Participation Form for the opt-out, Perkins did not submit a Participation Form to the Claims Office on or before November 29, 2004.

On February 4, 2005, Perkins was referred to the Dow Corning Settlement Facility and told that it was in total disarray, was 50,000 claims behind, had not paid claims in two years, and its current administrator was being forced to step down. The Settlement Facility (1) could not find her records; (2) could not tell her if she had opted-in or opted-out; and (3) could not tell her when she registered or what her SID's# or Lot#'s were. Perkins was referred to the MDL Facility, a representative of whom confirmed that Settlement Facility was in total disarray.

After multiple calls to the Settlement Facility, Perkins discovered that her records had never been updated and the Settlement Facility had an incorrect address in her file where the opt-out information had been sent and returned undelivered. She was advised by the Settlement Facility that she should write a letter of Appeal to Judge Hood, U.S. District Court in Detroit, MI, on or before February 28, 2005, and she would be allowed to opt-out after the November 2004 deadline. On February 18, 2005, Perkins sent a letter to the District Court, with an explanation and statement of facts.

The new administrator for the Settlement facility, who was appointed two years after Perkins originally updated her information via email, contended that Perkins's opt-out information was

sent to her last known address and that of her attorney. However, the administrator failed to mention that the Settlement Facility was in total disarray at that time and that her records had never been updated when the opt-out information was sent.

Procedural History

Perkins, a member of a class of breast implant claimants, moved to opt out of the Settlement Facility-Dow Corning Trust after the opt-out deadline had elapsed. In her motion, Perkins contended that she notified the Settlement Facility of her address by sending an email regarding her address prior to the November deadline as advised by Al Hawkins, Attorney with Alexander Haas Law Firm in San Francisco, referred there by Nancy Leonard, FDA. Her file was never updated due to the total disarray of the Settlement Facility. The email was sent to The Tort Claimants' Committee whose name was changed to the Claimants' Advisory Committee (CAC) when Dow Corning was allowed to reorganize. It was suggested that Perkins sent her email to the wrong email address, but this same email address still resides on the CAC's website today.

The district court denied Perkins' motion. It held that the plain and ordinary meaning of the word "must" as set forth in the Plan is that claimants are required to affirmatively elect to litigate and to complete and return the participation form by the election deadline, and that the requirement is mandatory and not discretionary. The Court further found that the failure of Perkins and her attorneys to provide the Settlement Facility

with her current address did not constitute excusable neglect.

Perkins called the CAC after receiving the U.S. District Court decision and asked how they would have handled the email they received in September 2003, addressed to the Dow Corning Settlement Facility, and they said they were a court appointed go-between for the claimants and the Settlement Facility and that they would have forwarded it on the Settlement Facility and asked them to review it and look into the matter.

Proceedings on Appeal

The Sixth Circuit affirmed, stating: "We agree with the District Court and adopt its well-reasoned opinion and order."

REASONS FOR GRANTING THE WRIT

This case presents an issue of far-reaching impact on class action cases in which class members do not receive the required forms and documentation prior to the deadline to opt in or out of a class and that it was totally beyond Perkins knowledge that the Settlement Facility was in total disarray when her information was updated. Perkins was also held accountable for her attorney's failure to update her address, even though it had already been update by Perkins.

I. THE SIXTH CIRCUIT'S JUDGMENT IGNORES THE FACT THAT PERKINS AFFIRMATIVELY ELLECTED TO LITIGATE OUTSIDE THE CLASS.

The Sixth Circuit erred by ignoring Perkins' clear manifestations of her intent to litigate her claims outside the class. While she does not dispute that she did not follow the strict procedures designated by the Amended Joint Plan of Reorganization and the accompanying plan documents, the district court and the Sixth Circuit should have made a fair and equitable substantive decision, rather than find some procedural default. Here, there can be no doubt that Perkins' conduct—including registering her claim with the Dow Corning Corporation, updating her name, address and diagnosis one year prior to the deadline, and consulting counsel regarding her right to opt out—clearly demonstrated that she affirmatively elected to litigate her claims outside the class.

II. THE SIXTH CIRCUIT'S JUDGMENT IGNORES THE EXCUSABLE NEGLECT RESULTING IN PERKINS' FAILURE TO TIMELY OPT OUT.

Moreover, the Sixth Circuit erred by affirming the district court's determination that Perkins' failure to timely opt out was not the result of excusable neglect.

Under the circumstances of this action, in which claimants have been categorized differently under the "Litigation Facility Agreement" and in which the so-called "opt-out" deadline has undergone a number of revisions and changes, the district court's and Sixth Circuit's draconian application of the November 29, 2004 deadline is an unduly harsh sanction for a claimant who had properly registered

under earlier procedures and had attempted to follow the various methods for opting-out. The district court's and Sixth Circuit's unreasonable denial of Perkins's right to opt out of the class constitutes a denial of procedural due process and is contrary to fundamental notions of fairness. *See Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

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No. _____

In The
Supreme Court of the United States

LOU ANNE LAVENDER PERKINS,
Petitioner,

v.

DCC LITIGATION FACILITY, INCORPORATED,
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APPENDIX

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United States Court of Appeals, Sixth Circuit.

In re: DOW CORNING CORPORATION,
Reorganized Debtor,

Lou Anne Lavender **Perkins**, Plaintiff-Appellant
v.
DCC Litigation Facility, Inc., Defendant-Appellee.

No. 07-1585.

July 18, 2008.

On Appeal from the United States District Court for the Eastern District of Michigan.

314 BEFORE: MOORE and MCKEAGUE, Circuit Judges; SCHWARZER, FN District Judge.

FN* The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

OPINION

WILLIAM W. SCHWARZER, District Judge.

1 **Lou Anne Lavender **Perkins**, a member of a class of breast implant claimants, moved to opt out of the Settlement Facility-Dow Corning Trust after the opt-out deadline had elapsed. Under the Amended Joint Plan of Reorganization for Dow Corning Corporation, claimants had the option to settle or to elect to opt out of the settlement under

the Settlement Facility and proceed with litigation against the Litigation Facility. Claimants electing to pursue litigation instead of participating in the settlement program "must make their election by completing, signing and returning the Participation Form to the Claims Office on or before the six (6)-month anniversary of the Effective Date ("Election Deadline")." (Settlement Fund and Distribution Agreement, Annex A. Art.3.02(c)(v)). The Election Deadline was November 29, 2004.

Perkins did not submit a participation form. In her motion, she argued that she never received a form. However, a claim form packet was mailed to **Perkins'** attorney at his last known address and when it was returned as undeliverable, another packet was sent to **Perkins** at her last known address, which again was returned as undeliverable. **Perkins** claims that she notified the Settlement Facility of her address, but the only communication from her prior to the November deadline was an e-mail addressed to the Tort Claimants' Committee. Not until February 2005 did she contact the Settlement Facility to give her new address. In September 2005, she notified the Settlement Facility of another new address but she never filed a claim form.

The District Court had jurisdiction under the Plan of Reorganization to resolve controversies regarding the interpretation and implementation of the Plan. The Court denied **Perkins'** motion. It held that the plain and ordinary meaning of the word "must" as set forth in the Plan is that claimants are required to affirmatively elect to litigate and to complete and

return the participation form by the election deadline, and that the requirement is mandatory and not discretionary. The Court further found that the failure of **Perkins** and her attorneys to provide the Settlement Facility with her current address did not constitute excusable neglect. We agree with the District Court and adopt its well-reasoned opinion and order.

For the reasons stated, we **AFFIRM** the judgment of the district court.

C.A.6 (Mich.),2008.
In re Dow Corning Corp.
284 Fed.Appx. 313, 2008 WL 2796082 (C.A.6 (Mich.))

END OF DOCUMENT

United States District Court
Eastern District of Michigan
Southern Division

In re: DOW CORNING CORPORATION,
Reorganized Debtor,

Lou Anne Lavender Perkins,
v.
DCC Litigation Facility, Inc.

Civil Action No. 06-CV-12558-DT
Honorable Denise Page Hood

ORDER DENYING MOTION FOR RECONSIDERATION

On March 31, 2007, the Court filed (entered on April 2, 2007) a Memorandum Opinion and Order denying Lou Anne Lavender Perkins' Motion/Appeal to File Notice of Intent. Ms Perkins filed a Motion to Exend Time to Respond to the Order on April 30, 2007, a Motion for Reconsideration on May 1, 2007 and a Notice of Appeal on May 1, 2007

The Local Rules of the Eastern District of Michigan provide that any motion for reconsideration shall be served not later than ten (10) days after entry of such order. E.D. Mich. LR 7.1(g)(1). No Response to the motion andno oral argument thereon shall be allowed unless the Court, after filing of the motion, otherwise directs. E.D. Mich. LR 7.1(g)(2). The

Local Rule states:

> (3) Grounds. Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

E.D. Mich. LR 7.1(g)(3)

Although Ms. Perkins filed her Motion for Reconsideration beyond the ten days after the entry of the Memorandum Opinion and Order, Ms. Perkins filed the requests and Motion for Reconsideration within ten days after the service of the Memorandum Opinion and Order. (Docket No. 10, 4/19/07, Certificate of Service)

Ms. Perkins' letter-motion essentially reiterates her arguments raised in her previous letters to the Court. Ms. Perkins claims that she was represented by Paul Boudreau and Karen Read. The Court addressed these issues in its March 31, 2007 Memorandum Opinion and Order. The Court finds that Ms. Perkins' requests/letter motions merely present the same issues ruled upon by the Court, either expressly or by reasonable implication. The Court further finds that Ms. Perkins has not demonstrated a palpable defect by which the Court

and the parties have been misled nor has she shown that a different disposition of the case would result from a correction of any error.

Accordingly,

IT IS ORDERED that Ms. Perkins Motion to Extend Time (Docket No. 11, filed April 30, 2007) is GRANTED.

IT IS FURTHER ORDERED that the Motions for Reconsideration (Docket Nos. 12 and 15, filed May 1, 2007 and May 3, 2007, respectively) are DENIED.

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge

DATED: February 28, 2008

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on this date, February 28, 2008, by electronic means and/or first class U.S. mail.

S/Sakne Srour
Deputy Clerk